ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

7 July 1998 *

In Case T-65/98 R,

Van den Bergh Foods Ltd, formerly HB Ice Cream Ltd, a company incorporated under Irish law, established in Dublin, represented by Malcolm Nicholson and Michael Rowe, Solicitors, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 2 Place Winston Churchill,

applicant,

v

Commission of the European Communities, represented by Barry Doherty and Wouter Wils, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for suspension of execution of the Commission Decision of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 — Van den Bergh Foods Limited),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Procedure

1 By application lodged at the Registry of the Court of First Instance on 21 April 1998, Van den Bergh Foods Ltd ('Van den Bergh'), formerly HB Ice Cream Ltd ('HB'), brought an action under the fourth paragraph of Article 173 of the EC Treaty for annulment of the Commission Decision of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 — Van den Bergh Foods Limited).

2 By separate document lodged at the Court Registry on the same day, it also applied under Article 185 of the Treaty for suspension of execution of that decision until such time as the Court has given judgment on the main application or, in the alternative, such further or other relief as may be just and appropriate.

3 By applications lodged at the Court Registry on 4 and 11 May 1998 respectively, Master Foods Ltd, trading as Mars Ireland and as Masterfoods ('Mars'), a company incorporated under Irish law, established in Dublin, represented by Philip G. H. Collins, Solicitor, and Treats Frozen Confectionery Ltd ('Treats'), a company incorporated under English law, established in Leeds, England, represented by Alasdair Bell, Solicitor, both with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe, sought leave to intervene in the present proceedings in support of the forms of order sought by the Commission.

4 The applications for leave to intervene were served on the main parties in accordance with Article 116(1) of the Rules of Procedure.

5 By telefax registered at the Court Registry on 14 May 1998, Van den Bergh stated that it had no objection to the application for leave to intervene submitted by Mars, but objected to that of Treats on the ground that it did not have a sufficient interest in the outcome of the case. It requested that an edited version only of its application and of the contested decision should be communicated to the applicants for leave to intervene. It therefore listed the information which it considered to be secret or confidential.

6 The Commission submitted its written observations on the interlocutory application on 13 May 1998. By separate documents registered on 20 May 1998, it stated that it had no objection to the two applications for leave to intervene. With regard to the applicant's request for confidential treatment, it expressed certain reservations.

7 By letters dated 27 May 1998, the Court Registry invited the applicants for leave to intervene to attend the hearing and served non-confidential copies of the application for suspension on them, together with the Commission's observations thereon.

8 Oral argument by the parties was heard on 9 June 1998.

9 On 12 and 25 June 1998 and 23 and 24 June 1998 respectively, Mars and the applicant sent the Court Registry telefax messages containing information regarding the legal proceedings pending before the Supreme Court in Ireland. Those documents were served on the other parties.

Background to the dispute

10 Van den Bergh, a wholly-owned subsidiary of Unilever NV and Unilever plc, is the principal manufacturer of ice cream in Ireland, and particularly of 'impulse' ice cream for immediate consumption. Its practice in Ireland is to make freezer cabinets available to retailers selling its ice creams on condition that they be used exclusively for the sale of those ice creams.

11 In March 1990, Mars brought an action in the Irish High Court for a declaration that the exclusivity requirement in HB's freezer-cabinet agreements was void under domestic law and under Articles 85 and 86 of the Treaty. HB brought a separate cross-action claiming injunctions to restrain Mars from inducing breaches by retailers of the exclusivity conditions in those agreements. In April 1990, pending the trial of that action, interlocutory injunctions to that effect were granted by the High Court in favour of HB.

12 On 28 May 1992, the High Court gave judgment in both actions. It dismissed the action brought by Mars, holding that HB's policy of exclusivity as regards its freezer cabinets was not contrary to either domestic or Community rules on

competition. It also granted HB a permanent injunction restraining Mars from inducing retailers to stock its ice creams in freezer cabinets belonging to HB.

13 Mars appealed against the High Court judgment on 4 September 1992. The Supreme Court, at the hearing on that appeal on 10 June 1998, considered that the case before it raised issues relating to the interpretation of the Treaty and expressed its intention to seek a preliminary ruling by the Court of Justice under Article 177 of the Treaty. It further indicated that the High Court's injunction would not be stayed pending a decision on the appeal.

14 In parallel to the legal proceedings in the Irish courts, Mars lodged a complaint against HB with the Commission on 18 September 1991, under Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). That complaint concerned HB's provision to a large number of retailers of freezer cabinets to be used exclusively for its own products.

15 On 29 July 1993, the Commission addressed a statement of objections to HB in which it considered that HB's distribution system infringed Articles 85 and 86 of the Treaty.

16 Following discussions with the Commission, HB, while disagreeing with its position, made certain proposals with a view to qualifying for an exemption under Article 85(3) of the Treaty. Those proposals were notified to the Commission on 8 March 1995 and on 10 March 1995 the Commission issued a press release in which it stated that, on first view, the changes envisaged appeared to justify granting an exemption. A notice pursuant to Article 19(3) of Regulation No 17 was subsequently published in the *Official Journal of the European Communities*, on 15 August 1995.

17 On 22 January 1997, considering that the changes as ultimately implemented had not achieved the expected results in terms of outlets rendered accessible, the Commission sent HB a new statement of objections. HB responded with its views on the objections made.

18 In the contested decision of 11 March 1998, the Commission:

— finds that the exclusivity provision in the freezer-cabinet agreements concluded between Van den Bergh and retailers in Ireland for the placement of cabinets in retail outlets having only one or more freezer cabinets supplied by Van den Bergh for the stocking of single-wrapped items of impulse ice cream and not having a freezer cabinet either procured by themselves or provided by another ice-cream manufacturer constitutes an infringement of Article 85(1) of the Treaty (Article 1);

— rejects Van den Bergh's request for an exemption for the exclusivity provision described in Article 1 pursuant to Article 85(3) of the Treaty (Article 2);

— finds that Van den Bergh's inducement to retailers in Ireland not having a freezer cabinet either procured by themselves or provided by another ice-cream manufacturer to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply to them one or more freezer cabinets for the stocking of single-wrapped items of impulse ice cream and to maintain the cabinets free of any direct charge constitutes an infringement of Article 86 of the Treaty (Article 3);

— requires Van den Bergh immediately to cease the infringements set out in Articles 1 and 3 and to refrain from taking any measure having the same object or effect (Article 4); and

— requires Van den Bergh, within three months of notification of the decision, to inform retailers with whom it currently has freezer-cabinet agreements constituting infringements of Article 85(1) of the Treaty, as described in Article 1, of the full wording of Articles 1 and 3 and to notify them that the exclusivity provisions in question are void (Article 5).

19 In the decision, the Commission sets out the detailed legal analysis on which it bases the application of Article 85 of the Treaty.

20 It states in particular (at paragraph 157):

'A supplier who wishes to gain access for the sale of his impulse ice-cream products to a retail outlet (that is, a new entrant to the outlet) in which at least one supplier-exclusive freezer cabinet is in place can only do so if that outlet has a non-exclusive cabinet/s ... *or* if he can persuade the retailer *either* to replace an *in situ* supplier-exclusive cabinet *or* to install an additional freezer cabinet alongside the *in situ* supplier-exclusive cabinet, or cabinets.'

21 It considers (paragraphs 158 to 183), on the basis of survey evidence, that retailers are unlikely to take either of those steps, and thus concludes (paragraph 184) that the sales outlets in question are *de facto* tied to the applicant.

22 The decision also finds that the agreements cannot be exempted under Article 85(3) of the Treaty, since they do not contribute to improving the distribution of goods (paragraphs 222 to 238), do not allow consumers a fair share of the resulting

benefit (paragraphs 239 and 240), are not indispensable to the attainment of the benefits invoked (paragraph 241) and afford HB the possibility of substantially eliminating competition in the relevant market (paragraphs 242 to 246).

23 With regard to the application of Article 86 of the Treaty, the Commission considers that the applicant has a dominant position in the market for impulse ice cream in Ireland.

24 It considers (paragraph 263):

'HB abuses its dominant position in the relevant market, contrary to Article 86, in that it induces retailers ... who do not have a freezer cabinet for the storage of impulse ice cream either procured by themselves or provided by another ice-cream supplier than HB to enter into freezer-cabinet agreements subject to a condition of exclusivity. The inducement takes the form of an offer to supply the freezer cabinets to retailers, and to maintain them, at no direct charge to the retailer.'

Law

The applications for leave to intervene

25 The applications for leave to intervene submitted by Mars and Treats must be considered separately.

26 With regard to Mars's application, it is relevant that the contested decision terminates the administrative procedure initiated by the Commission following the complaint lodged by Mars on 18 September 1991, in which it alleged that HB's provision to a large number of retailers of freezer cabinets on the basis of cabinet exclusivity and the terms on which those cabinets were provided to retailers hindered it, in restraint of competition, from gaining access to retail outlets for the sale of its impulse ice-cream products in Ireland. It is, furthermore, undisputed that Mars took an active part in the administrative procedure before the Commission. Finally, as the applicant has itself stressed in its written submissions, its dispute with Mars, still pending before the national court, turns on whether the exclusivity requirement in HB's freezer-cabinet agreements in Ireland is lawful under Community competition law.

27 Mars has therefore established an interest in intervening in support of the forms of order sought by the Commission in the present interlocutory proceedings.

28 Treats, the other applicant for leave to intervene, puts forward in substance two grounds which, it considers, establish its interest in the outcome of the case. First, it is active on the market for impulse ice cream in Great Britain and in Northern Ireland, and has for many years been attempting to enter the market in Ireland. Its attempts have, however, been unsuccessful because of the large number of retailers bound by the exclusivity requirement in the applicant's freezer-cabinet agreements. Secondly, Treats states that it took part in the administrative procedure before the Commission.

29 The applicant objects that it has no knowledge of any serious attempt by Treats to penetrate the market for impulse ice cream in Ireland, and considers that Treats cannot therefore claim to have an interest in the outcome of proceedings relating to that market. It claims, moreover, that Treats took part in the administrative procedure before the Commission only to a limited extent and ceased to show any

interest after March 1995. Finally, any interest which Treats might have concerns the reasoning on which the decision was based and not the outcome of the case.

30 It must be noted, however, that, as Treats stated in its oral argument, its sales to wholesalers in Ireland tripled between 1994 and 1997 and that its distributor in Northern Ireland has begun to make sales on the Irish market. The majority of Treats sales on that market are, moreover, of impulse ice cream.

31 Treats must therefore be accepted as having a sufficient interest in intervening in support of the forms of order sought by the Commission in the present interlocutory proceedings.

The request for confidential treatment

32 For the purposes of these interlocutory proceedings, Van den Bergh's request for confidential treatment for certain information must be granted, since the information in question may prima facie be regarded as secret or confidential within the meaning of Article 116(2) of the Rules of Procedure.

The request for suspension of execution

33 Under Article 185 of the Treaty, taken together with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144,

p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended.

34 Article 104(1) of the Rules of Procedure specifies that an application to suspend the operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. Article 104(2) provides that an application of that kind must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for. The measure sought must further be provisional inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

35 It is necessary to determine whether those conditions are met in the present case.

Arguments of the parties

36 The applicant points out that its main application seeks annulment of the contested decision in so far as it contains a finding that Articles 85 and 86 of the Treaty have been infringed.

37 It maintains, *inter alia*, that the decision contains manifest errors of assessment of facts leading to errors of law. It challenges the Commission's assumption that the exclusivity requirement in the freezer-cabinet agreements forecloses the market for impulse ice cream in Ireland.

38 In particular, the Commission is wrong to consider, first, that all retailers having only HB freezer cabinets are '*de facto* ... tied' and, second, that the market for impulse ice cream in Ireland is in fact foreclosed.

39 As regards the *de facto* tie, the applicant states that its freezer-cabinet agreements can in practice be terminated without notice by the retailer, who may then decide to replace the cabinet provided by HB with a cabinet of his own, a cabinet belonging to another supplier or two smaller cabinets, either or both of which may be owned by an undertaking other than HB. Moreover, a retailer with a cabinet provided by HB always has the option of installing an additional cabinet. The Commission thus erred in its assessment of the opportunities available to retailers to replace an HB freezer cabinet or to install additional cabinets. It was therefore wrong to conclude (in paragraph 184 of the decision) that the category of outlets where the only freezer cabinet or cabinets in place belong to the applicant 'can be said to be *de facto* exclusively tied to the sale of the impulse ice-cream products of HB'.

40 With regard to the degree of foreclosure of the relevant market, the applicant points out that, according to the decision, outlets where the only freezer cabinet or cabinets in place belong to it account for approximately 40% of the market and 40% of sales on the relevant market. That analysis is, however, wrong because it includes outlets which should not be taken into account. According to the applicant's calculations, the degree of market foreclosure is approximately 6%.

41 The applicant also argues that the Commission erred in law in its application of Article 85(1) of the Treaty. According to the qualitative approach to the application of that provision to vertical agreements adopted by the High Court in its judgment of 28 May 1992, the exclusivity requirement in the agreement concluded with retailers falls outside the scope of Article 85(1). A quantitative approach would lead to the same conclusion: there is no sufficiently material restriction of compe-

tition for Article 85(1) to apply (Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533 and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611).

42 The applicant further submits that the Commission made an error of assessment in refusing to grant it an exemption under Article 85(3) of the Treaty, because the four cumulative conditions laid down in that paragraph were in fact fulfilled. In particular, the benefits arising from the exclusivity requirement would normally justify exemption: reduced costs of ice-cream distribution, widespread geographical availability of impulse ice cream, economies of scale in cabinet provision and maintenance, improved merchandising, improved product visibility and protection of product integrity. The Commission itself had previously accepted the exclusivity as indispensable for attainment of the benefits arising from the agreements between the applicant and its retailers.

43 In applying Article 86 of the Treaty to the circumstances of the case, the Commission made a further error of assessment, in that it relied effectively on an alleged foreclosure effect brought about by HB's freezer-cabinet agreements.

44 With regard to the urgency of the need to suspend execution of the decision, the applicant submits that the consequence of bringing its agreements into compliance with the operative part of the contested decision will be that retailers will immediately or very quickly stock other producers' ice creams in freezer cabinets owned and maintained by it. That would cause it financial damage and would lead to market developments which it could not subsequently reverse. If retailers directly concerned by the decision were to become accustomed to stocking third-party products in its cabinets, it would be faced with enormous difficulty in reasserting the exclusivity requirement were the decision subsequently to be annulled in the main action.

45 Finally, the applicant examines the balance of interests between, on the one hand, the damage likely to be caused to it in the event of the decision's being executed and, on the other, the Commission's interest in bringing the alleged infringements to an end. In its written pleadings, it stresses in particular that the Supreme Court may well seek a preliminary ruling by the Court of Justice under Article 177 of the EC Treaty on the compatibility with the Treaty of the exclusivity requirement in HB's agreements with retailers. Furthermore, the effect of not suspending the decision might be to undermine, if not to circumvent, the injunction ordered by the High Court, which retains full force and effect.

46 The Commission considers that the application to suspend execution of the decision is inadmissible in so far as it concerns Articles 1 to 3 thereof, since their provisions do not involve execution as such.

47 It points out that the decision does not find that freezer exclusivity is *per se* contrary to Article 85(1) of the Treaty. In the specific situation of the market for ice cream in Ireland, agreements which on their face create only freezer exclusivity have the effect of creating *de facto* outlet exclusivity (cf. the judgments in *Langnese-Iglo* and *Schöller*, cited above). Sales outlets tied *de facto* by the exclusivity requirement represent at least 40% of the market and 40% of sales in the relevant market. The key element in its assessment is thus the economic effect of the agreements. The Commission denies that the degree of market foreclosure may be assessed at 6%, as argued by the applicant.

48 It further maintains that it is in no way bound by the High Court's judgment in the dispute between the applicant and Mars, in which Community law was applied. That judgment was based on the situation in 1992, whereas the contested decision takes account of a 1996 market survey and of market shares from 1997. Furthermore, between 1992 and 1997, the applicant had altered the arrangements

considered by the High Court and the Commission, in its assessment, took into account the judgments of the Court of First Instance in *Langnese-Iglo* and *Schöller*, cited above, which were delivered in 1995.

49 With regard to the application of Article 86 of the Treaty, the Commission emphasises, principally, that the concept of abuse is an objective one.

50 For the remainder, it disputes all the pleas in law and arguments put forward by the applicant, which, it concludes in the light of the case-law, has not made out a prima facie case.

51 Urgency, the Commission submits, has not been demonstrated by the applicant, and the alleged damage, consisting of loss of sales, has not been established. With regard to damage arising from 'free-riding' by competitors, the Commission considers that Van den Bergh could recover its investment from retailers in a number of ways. Finally, it does not appear in the present case that if the decision were not suspended the applicant would be exposed to a situation liable to endanger its very existence or to restrict its market share irreversibly (see, in particular, Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 42).

52 In its written and oral observations, Mars has stated that it has an immediate interest in competing with Van den Bergh on the relevant product market. It considers that the interests of consumers, retailers and suppliers should be taken into account in the assessment of the interlocutory application.

53 Treats considers that there is an urgent need for the decision to be executed immediately in order to remove the structural barriers to access to the relevant product market in Ireland.

Findings of the President

— Prima facie case

54 The parties are in fundamental disagreement with regard to the true conditions for access to the relevant market and to the degree of foreclosure of that market. The applicant denies that retailers having only freezer cabinets provided by it are tied *de facto* and that the market for impulse ice cream in Ireland is really foreclosed.

55 As regards the second point in dispute, the applicant stresses that the fact that approximately 40% of all retail outlets have only freezer cabinets provided by it does not mean that 40% of retail outlets are inaccessible to competing suppliers. When calculating the degree of foreclosure of the market, the Commission was wrong, *inter alia*, to include all outlets having two or more HB freezer cabinets, which are clearly outlets where there is sufficient space to place a cabinet belonging to the retailer or to another supplier.

56 Here, it is important to note that if the Court were indeed to find that the Commission erred in its assessment of the degree of foreclosure of the market, such a finding would clearly have an effect on the assessment of the degree of restriction of competition on that market within the meaning of Article 85(1) of the Treaty.

57 The applicant's arguments concerning the degree of foreclosure of the market therefore need to be examined thoroughly. Such an examination is not, however, possible in the context of these interlocutory proceedings.

58 Nor, in so far as the granting of an exemption under Article 85(3) of the Treaty is dependent on the assessment previously made under Article 85(1), is it for the judge hearing the interlocutory application to give a ruling on the arguments relating to whether the conditions for an exemption are fulfilled.

59 An initial examination of the decision further shows that the Commission's assessment of the applicant's conduct under Article 86 of the Treaty is very closely linked to its assessment under Article 85(1) of HB's agreements for the distribution of its impulse ice cream in Ireland, under which it provides freezer cabinets to sales outlets stocking its products, subject to an exclusivity requirement. The Commission's assessment under Article 86 of the Treaty is based on the following finding: 'Where, as in the present case, an economic operator holds a dominant position in the market, exclusive supply (whether this is the object or the effect of agreements concluded by this operator) constitutes an unacceptable obstacle to entry into the market ...' (paragraph 265). The allegation of exclusive supply is based on the consideration that it is extremely difficult to persuade retailers to replace HB freezer cabinets already in place with a cabinet from another source or to install new cabinets. That premiss is, however, specifically impugned by the applicant when it challenges the Commission's assessment in the decision of the true conditions of access to the relevant market and the degree of foreclosure of that market.

60 Finally, it appears that the question whether the exclusivity requirement in the applicant's freezer-cabinet agreements with retailers is lawful under Articles 85 and 86 of the Treaty has been raised in the competent national courts. In a judgment of

28 May 1992, it was considered that that exclusivity requirement did not infringe either Article 85(1) or Article 86 of the Treaty.

61 In view of all the foregoing, the pleas in law put forward by the applicant cannot be held prima facie to lack any foundation.

— Urgency

62 It has consistently been held that the urgency of an application for suspension must be assessed in relation to the necessity to give an interim judgment in order to prevent serious and irreparable damage being occasioned to the party seeking suspension. In that regard, it is sufficient that the damage, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (see, *inter alia*, Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraphs 32 and 34).

63 In the present instance, immediate execution of the contested decision means revoking the contested exclusivity requirement applicable to freezer cabinets placed in the retail outlets referred to in Article 1 of the decision. It thus entails changes to a distribution system which has been in place on the Irish market for many years. If execution of the decision is not suspended, Van den Bergh's competitors on the relevant market, such as Mars and Treats, will immediately make every effort to sell their products through outlets which had previously been less readily accessible by having them stocked in the applicant's freezer cabinets. The seasonal nature of sales of the products in question, which are purchased largely during the summer months, is relevant in that regard.

64 In those circumstances, any effect on the applicant's distribution system as a result of revocation of the exclusivity requirement would be serious and irreparable.

65 Were the decision to be annulled by the Court, Van den Bergh's financial losses would be difficult to quantify for the purposes of making reparation, as the applicant would be unable to determine with sufficient accuracy the proportions of the recorded drops in sales caused respectively by stronger competition on the market or by unpredictable weather variation during the high season.

66 In addition, there are serious grounds for believing that the market developments to which immediate execution of the decision is likely to give rise would be very difficult, if not impossible, to reverse subsequently if the application in the main action were to be upheld. The applicant has rightly pointed out the extreme difficulty it would encounter if, following annulment of the decision by the Court, it had to make retailers comply with the exclusivity requirement again, following a period of months during which they had sold other products stocked in its freezer cabinets.

67 However, suspension of execution of the contested decision is at the same time likely to help reinforce the present structure of the market, thereby preventing Van den Bergh's competitors, including Mars and Treats, from selling their products through retail outlets bound by the contested exclusivity requirement.

68 In view of that factual and legal situation, it is necessary in these interlocutory proceedings to weigh the competing interests, including that of the Commission in reestablishing effective competition.

69 A balance must thus be struck between the risk to the applicant of finding its distribution system modified and the Commission's interest in putting an immediate end to what it regards as infringement of the Community rules on competition. Here, it is important to note that the exclusivity requirement in the freezer-cabinet agreements, to which the Commission objects, is a practice of long standing on the relevant market. In addition, the length of the administrative procedure which culminated in the adoption of the contested decision was due in part to the Commission's attempts to persuade the applicant to modify its impulse ice-cream distribution agreements with retailers in the light of the objections made in that regard. Thus, after notification of the first statement of objections in July 1993, in which the Commission had provisionally concluded that the system of distribution operated at that time infringed Articles 85 and 86 of the Treaty, the applicant made a number of commitments, notified to the Commission in March 1995, with a view to obtaining an exemption under Article 85(3) of the Treaty. On the basis of those commitments, the Commission envisaged taking a decision under Article 85(3) of the Treaty, and published a notice pursuant to Article 19(3) of Regulation No 17 in the Official Journal in August 1995. It was therefore only because it considered that the changes made had not in fact achieved the expected results in terms of access to outlets that the Commission sent the applicant a new statement of objections in January 1997. In those circumstances, the Commission is not entitled to claim that immediate enforcement of the decision is a matter of urgency.

70 Account must also be taken of the fact that the national court hearing the dispute between Mars and the applicant held that the applicant's distribution system did not infringe Articles 85 and 86 of the Treaty, and granted a permanent injunction against Mars. The judgment delivered by the High Court on 28 May 1992 is currently under appeal in the Supreme Court. At the hearing on 10 June 1998, the Supreme Court, considering that the case before it raised issues relating to the interpretation of the Treaty, expressed its intention to seek a preliminary ruling by the Court of Justice under Article 177 of the Treaty and did not stay the permanent injunction against Mars. There is thus, prima facie, an apparent contradiction between the views of the Commission and those of the national courts in the application of Articles 85 and 86 of the Treaty.

71 Whilst it is true that the Commission is responsible for the implementation and orientation of Community competition policy, it does not have exclusive competence to apply Articles 85(1) and 86 but shares that competence with the national courts (*Delimitis*, cited above, paragraphs 44 and 45). In the present case, that sharing of competence with regard to the application of the Community rules on competition has given rise to a conflict between the Commission's decision, adopted on 11 March 1998, and the judgment delivered by the High Court in 1992.

72 Since such a contradiction is contrary to the general principle of legal certainty, its adverse effects should be limited as far as possible. In the very particular circumstances of the present case, it is important, pending delivery of judgment on the main action by the Court of First Instance, not to interfere with the proceedings brought before the national courts, particularly since the Supreme Court has expressed its intention to seek a preliminary ruling by the Court of Justice in order that the case be dealt with in conformity with Community law, and has not stayed the permanent injunction.

73 In view of those considerations, the Commission's interest in having the infringement brought to an end cannot prevail over the applicant's interest in not running the risk of jeopardising the system in place or over the interest in limiting the effects of a contradiction in the application of the provisions of the Treaty, before the Court of First Instance has been able to give a decision on the main action.

74 In conclusion, immediate execution of the contested decision pending the conclusion of the proceedings on the main action would entail the danger not only of causing the applicant serious and irreparable damage but also of furthering a situation of legal uncertainty. The fact that Van den Bergh's competitors on the market find it difficult to distribute their products as a result of alleged structural barriers cannot take precedence over the risks thus identified.

75 The balance of interests thus inclines in favour of ordering suspension of execution of the decision.

76 In the light of the specific circumstances of the case, the risks identified above (in paragraph 74) constitute a fundamental objection to the immediate execution of the decision whose suspension is sought, and the Commission's objection that suspension cannot be ordered in respect of Articles 1, 2 and 3 of the decision must be rejected.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Master Foods Ltd and Treats Frozen Confectionery Ltd are granted leave to intervene in Case T-65/98 R in support of the forms of order sought by the defendant.

2. The requests for confidential treatment made by Van den Bergh Foods Ltd, with respect to certain information contained in its application for suspension of execution of the Commission Decision of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 — Van den Bergh Foods Limited), are granted for the purposes of the interlocutory proceedings.

3. Execution of that Commission Decision is suspended until such time as the Court of First Instance has given final judgment on the main action.

4. Costs are reserved.

Luxembourg, 7 July 1998.

H. Jung

Registrar

B. Vesterdorf

President